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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1566

IOWA STATE MEN'S REFORMATORY AND MICHAEL V. REAGEN, PH.D., Commissioner, Iowa Department of Social Services,

Petitioners,

v.

CYNTHIA GUNTHER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

Page

Citations ii
Opinions Below 1
Jurisdiction 2
Statute Involved 2
Questions Presented 2
Statement of the Case 3
Reasons for Granting the Writ 4
Conclusion 8
Appendix
A. Decision of the United States Court of Appeals for the Eighth Circuit, filed January 11, 1980 9
B. Order of the United States District Court for the Northern District of Iowa, filed January 5, 1979 23
C. Decision of the Supreme Court of Iowa, filed December 21, 1977 34
D. Certificate of Service 53

CITATIONS

Cases:

	Page
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	4,6
Dothard v. Rawlinson, 433 U.S. 321 (1977)	4,5
Iowa Department of Social Services v. Iowa Merit Employment Commission and Gunther, 261 N.W. 2d 161 (Iowa 1977)	3
Montana v. U.S., 440 U.S. 147 (1979)	4,5,6
The National League of Cities v. Usery, 426 U.S. 833 (1976)	4,6

Statutes:

28 U.S.C. § 1254(1)	2
42 U.S.C. § 2000e *et seq.*	2,4,6

IN THE SUPREME COURT OF THE UNITED STATES

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Attorney General of Iowa, on behalf of the Iowa State Men's Reformatory and Michael V. Reagen, Ph.D. prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit entered in the above case on January 11, 1980. Petition for Rehearing denied on February 5, 1980.

OPINIONS BELOW

The decision of the United States Court of Appeals for the

Eighth Circuit was made and entered on January 11, 1980, hereto appended as Appendix A, p. 9. Said opinion is not published. Now reported at 612 F.2d 1079.

The order of the United States District Court for the Northern District of Iowa is reported at 462 F.Supp. 952 and is appended to this Petition as Appendix B, p. 23.

The opinion of the Iowa Supreme Court is found at 261 N.W.2d 161 (Iowa 1977) and is appended hereto as Appendix C, p. 34.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Civil Rights Act of 1964, Title VII § 703(e). 42 U.S.C. § 2000e-2(e) provides:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

QUESTIONS PRESENTED

1. Section 703(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e), permits sex-based discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. Does a bona fide occupational qualification exist under the facts of this case

where a woman prison guard, Correctional Officer I, in a male prison sought a promotion to a Correctional Officer II? Thus, are the prisoner's rights to privacy and the administrations' need for security and order sufficient to be "reasonably necessary to the normal operation of that particular enterprise."

2. Whether a prior judgment by the Iowa Supreme Court precludes further consideration of the same case in the federal courts. That is, did the lower courts err in not applying the doctrines of *res judicata* and collateral estoppel to bar relitigation of the facts and applicable law already determined by the Iowa Supreme Court in *Iowa Department of Social Services v. Iowa Merit Employment Commission and Gunther*, 261 N.W.2d 161 (Iowa 1977).

STATEMENT OF THE CASE

The Respondent, Mrs. Cynthia Gunther, was employed on September 14, 1974 by the Iowa Men's Reformatory as a prison guard with the classification of Correctional Officer I (CO I). She supervised the inside visiting rooms, worked in the control center and guard towers. As a four-year college graduate (theater and English), Mrs. Gunther met the minimum qualifications for a Correctional Officer II (CO II). Mrs. Gunther applied for this position, but it was denied her on the basis that there was a bona fide occupational qualification (BFOQ) on this position based upon her sex.

Mrs. Gunther began her grievance procedure under the Iowa Merit Rules on March 21, 1975. On May 21, 1975, she filed her Complaint alleging discrimination based on her sex with the Iowa Civil Rights Commission. On the same date, she filed with the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor, Wage and Hour Division. The EEOC received her complaint and deferred to the Iowa Civil Rights Commission. The Department of Labor received her complaint and deferred to the EEOC and the Iowa Civil Rights Commission.

On September 25, 1975, a grievance appeal hearing was held before four members of the Iowa Merit Employment Commission which ruled in Mrs. Gunther's favor on October 2, 1975. This was appealed to the Iowa district court which affirmed. This was then appealed to the Iowa Supreme Court which reversed and held there was a BFOQ based upon the sex of the applicant for the position of a CO II.

Before the Iowa Supreme Court ruled, a complaint was filed in the federal district court under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* After the Iowa Supreme Court decision, Mrs. Gunther moved for Summary Judgment in the federal district court action. The Petitioner cross filed for Summary Judgment based on *res judicata.* The case was submitted to the federal district court on the record made before the state Merit Commission and the state judicial tribunals.

The federal district court granted Mrs. Gunther her Summary Judgment and denied same to Petitioners. The Eighth Circuit Court of Appeals affirmed this ruling.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Circuit Court constitutes an unwarranted constriction of previous Supreme Court decisions and conflicts in principle with *Dothard v. Rawlinson*, 433 U.S. 321 (1977), *Montana v. U.S.*, 440 U.S. 147 (1979), *The National League of Cities v. Usery*, 426 U.S. 833 (1976), while attempting to extend *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), into areas clearly not contemplated by Congress nor this Court.

II.

This case raises issues of nationwide concern on which the federal courts in various sovereign states have reached opposite

results on whether a decision in a sex discrimination case before a state administrative agency or court precludes later action in the federal courts.

III.

This case raises issues of nationwide concern with respect to the BFOQ exception to employment discrimination based upon the sex of the employee.

IV.

This case raises issues of nationwide concern with respect to the validity of judgments of the courts of highest resort of the various states.

V.

This case raises issues of nationwide concern with respect to the administration of the prisons in the various states.

In *Dothard, supra,* this Court found a BFOQ for the position of correctional counselor (prison guard) because "[t]he environment in Alabama's penitentiaries is a particular inhospitable one for human beings of whatever sex." 433 U.S. at 334. Diane Rawlinson was not hired. An application of *Dothard* by the courts below in the instant case seems to mean that even in those states, like Iowa, that do hire women as guards, she must be promoted. The courts reason that there can be no BFOQ up the promotional ladder because *Dothard* applied only to violent, unconstitutional prisons.

We submit that the *Dothard* decision applies outside this single application. States that do hire women guards should not be denied a BFOQ to those classifications beyond restricted scheduling of these employees that classification which restricts to visiting room surveilance, the control room or guard tower positions.

Only last year in *Montana v. U.S., supra,* the Court stated, "[a]bsent significant changes in controlling facts or legal

principles . . . or other special circumstances, the Montana Supreme Court's resolution of these issues is conclusive here." 440 U.S. at 157. Both the District Court and the Court of Appeals in the instant case recognized that summary judgment was to be decided on the record made before the state Merit Commission and state judicial tribunals, 462 F. Supp. at 954 and slip op. at 8. The District Court considered the facts independently in light of federal law while the Court of Appeals maintained that the state courts could not hear Title VII claims, as the state agency was only given jurisdiction to hear the discrimination claim based on state law. The fact remains: the record utilized by the federal courts was made before the state commission and state courts. The only difference was the result. The Civil Rights Act provides for the utilization of state, local and other agencies. 42 U.S.C. § 2000e-4(g). If Mrs. Gunther was dissatisfied with the opinion of the Iowa Supreme Court, this opinion should have been appealed to the U.S. Supreme Court per the *Montana* holding.

When Congress extended the minimum wage and maximum hour provisions of the Fair Labor and Standards Act to almost all employees of states and their political subdivisions, this Court held this to be impermissible under the Commerce Clause of the Constitution. *Usery, supra.* States have the ability to structure employer-employee relationships within the areas of traditional governmental functions. This is apropos to the case at bench. The state Supreme Court has the authority to find a BFOQ in the advanced classifications of women as prison guards in a male reformatory.

We recognize that the Court in *Alexander, supra,* held an employee's statutory right to trial *de novo* under the equal employment provisions of the Civil Rights Act is not foreclosed by a prior submission of the claim to final arbitration. This is not authority, however, to permit a claimant to forum shop when dissatisfied with the holding of the state Supreme Court.

How sex discrimination decisions are treated is, of course, a matter of national concern. The split of authority between the

circuits as to whether *res judicata* should be applied to state court decisions or state administrative decisions is clearly outlined by the Court of Appeals below. (Appendix A pp. 9-22; slip op. pp. 5-9) Further, it was the view of the Court of Appeals that Title VII created a "special circumstance" which warrants an exception to the normal rules of preclusion. *Id.* n.7 p.9. This is the crux of the controversy. We disagree with the Court of Appeals' decision--particularly in these circumstances--as a state ought to have the authority to determine whether or not a BFOQ exists for a job classification within its own prison system.

In addition to the deference afforded the Supreme Court decision of the various states, this case raises issues of nationwide concern pertaining to the balance of conflicting constitutional issues regarding rhe right of privacy of prisoners, if any, with the right of an applicant to be free from discrimination in a job promotion as opposed to the state's interest of maintaining order, security and control of their correction facility.

CONCLUSION

Petitioners request that this Court grant the Writ herein sought and review and correct the decision of the Circuit Court for the settlement of the problem for Iowa and the other sovereign states of the United States.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 79-1332

Cynthia Gunther, Appellee,	*	
v.	*	Appeal from the United States District Court for the Northern District of Iowa
Iowa State Men's Reformatory and Victor Preisser, Acting Commissioner of the Iowa Department of Social Services, Appellants.	*	

Submitted: November 6, 1979

Filed: January 11, 1980

Before GIBSON, Chief Judge,* STEPHENSON and HENLEY, Circuit Judges.

STEPHENSON, Circuit Judge.

Plaintiff brought an action in federal district court[1]

*The Honorable Floyd R. Gibson was Chief Judge of the Eighth Circuit at the time this case was submitted, and took senior status on December 31, 1979, before the opinion was filed.

[1]The Honorable Edward J. McManus, Chief Judge for the United States District Court for the Northern District of Iowa.

alleging the Iowa State Men's Reformatory at Anamosa (Anamosa) had discriminated against her solely on the basis of sex in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 *et seq.* The district court, in *Gunther v. Iowa State Men's Reformatory*, 462 F. Supp. 952 (N.D. Iowa 1979), held that employment practices which prevent women from obtaining jobs above the Correctional Officer I (CO I) level at the Men's Reformatory at Anamosa result in sex discrimination prohibited by Title VII, and the Men's State Reformatory appeals. We affirm the conclusion of the trial court.

In September 1974, plaintiff-appellee was employed by the Men's Reformatory at Anamosa as a CO I, although she satisfied the educational qualifications for the Correctional Officer II (CO II) classification. She performed some duties performed by CO II's but because of her sex did not perform all of the duties performed by male CO I's. She requested special training in riot control and self defense available to male officers and required for the CO II classification, but this was denied her. In April 1975, she applied for promotion to CO II status, which was denied her on the basis of her sex.

Plaintiff filed grievances with the Iowa Merit Employment Commission (I.M.E.C.) and the federal Equal Employment

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[2]42 U.S.C. § 2000e-2(a) provides:

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Opportunity Commission (EEOC) on May 21, 1975. Following the dictates of 42 U.S.C. § 2000e-5(c), the EEOC deferred any consideration of the case until the state I.M.E.C. considered the complaint. The I.M.E.C. ruled the plaintiff was entitled to the promotion, and the state district court upheld the ruling on appeal. In December 1977, the Iowa Supreme Court overturned the lower court and administrative ruling, finding under Iowa law that there existed a bona fide occupational qualification (bfoq) on which the state could premise the CO II classification. *Iowa Department of Social Services v. Iowa Merit Employment Department*, 261 N.W.2d 161 (Iowa 1977).

In October 1977, plaintiff filed a complaint in federal district court pursuant to Title VII alleging she was denied a promotion solely on the basis of her sex, and that no bfoq justified the sex discrimination. The case was submitted to the district court on cross-motions for summary judgment, to be decided on the record before the I.M.E.C. and judicial tribunals. The district court first ruled plaintiff's complaint was not barred by the res judicata or collateral estoppel effect of the Iowa Supreme Court decision. The court then concluded the prohibition of women from a CO II classification at Anamosa did not qualify as a bfoq exception[3] to Title VII's general prohibition against sex discrimination. It ordered that the plaintiff be promoted to the rank of CO II, with the qualification that Anamosa make a "functional assignment" of the plaintiff within the CO II classification to respect the inmates' privacy interests.

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[3]42 U.S.C. § 2000e-2(e) provides:

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, * * *.

Appellants' first contention is that the federal lawsuit is barred by the doctrines of res judicata and collateral estoppel because of the state court adjudication. We must therefore determine whether Title VII provides plaintiffs a separate federal forum in addition to the state discrimination proceedings.

The United States Supreme Court examined the purpose and intent of Congress in enacting Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). That case involved whether a final arbitration agreement would bar a subsequent Title VII action. In holding that an individual does not forfeit a private cause of action in federal court by first pursuing her grievance to final arbitration, the Court examined the intent of Congress in enacting Title VII, and its observations are relevant here.

> Title VII provides for consideration of employment-discrimination claims in several forums. See 42 U.S.C. § 2000e-5(b) (1970 ed., Supp. II) (EEOC); 42 U.S.C. § 2000e-5(c) (1970 ed., Supp. II) (state and local agencies); 42 U.S.C. § 2000e-5(f) (1970 ed., Supp. II) (federal courts). And, in general, submission of a claim to one forum does not preclude a later submission to another. See 42 U.S.C. §§2000e-5(b) and (f) (1970 ed., Supp. II); *McDonnell Douglas Corp. v. Green*, [411 U.S. 792 (1973)]. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discriminations.

415 U.S. 47-49 (footnotes omitted).

Although there is some question as to whether federal courts have been given exclusive jurisdiction to hear Title VII

claims,[4] we need not decide that question because here plaintiff could not raise her Title VII claim in the state proceedings. The state agency below was only given jurisdiction to hear the discrimination claim based on state law. Anamosa's appeal to the state district court, which affirmed the agency, was limited to the record before the agency. Anamosa's further appeal to the Iowa State Supreme Court was similarly limited by Iowa law. *See Hoffman v. Iowa Department of Transportation*, 257 N.W.2d 22, 24-25 (Iowa 1977).

In *Batiste v. Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975), plaintiffs brought a complaint with the Illinois Fair Employment Practice Commission, which dismissed the complaint. The plaintiffs then brought a Title VII claim in federal court. The Seventh Circuit held that no res judicata effect would be given the state proceeding.

> We must agree with the ruling in *Cooper v. Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972) where the court squarely rejected the application of the doctrines of election of remedies and res judicata to Title VII actions where plaintiffs had litigated their charges to final adjudication in state proceedings. There is a strong Congressional policy that plaintiffs not be deprived of their right to resort to the federal courts for adjudication of their federal claims under Title VII. * * * It is also apparent that if federal actions are barred by the application of election of remedies and res judicata, then the statutory scheme of deferral to state proceedings will be frustrated by requiring that the plaintiff, who desired to bring an

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[4] *Compare, e.g., Dickinson v. Chrysler Corp.*, 456 F. Supp. 43 (E.D. Mich. 1978) ("legislative history of Title VII and the compelling language of *Alexander v. Gardner-Denver, supra*, dictate that jurisdiction of Title VII litigation is exclusively vested in the federal courts") *with Bennun v. Board of Governors*, 413 F. Supp. 1274 (D.N.J. 1976) (jurisdiction is concurrent).

> action in federal court, first commence state proceedings but abandon them quickly before an adjudication is made.
>
> * * * It has been determined that the Congressional policies embodied in Title VII require that res judicata not be applied to state adjudications. *Cooper, supra; Voutsis v. Union Carbide Corporation*, 452 F.2d 889 (2d Cir. 1971) and *Young v. South Side Packing Company*, 369 F. Supp. 59 (E.D. Wis. 1973).

503 F.2d at 450. *See also, Garner v. Giarrusso*, 571 F.2d 1330, 1337-38 (5th Cir. 1978).

By its language *Batiste* applies to prior state "adjudications," although the facts in *Batiste*, *Cooper*, and *Voutsis* involved the res judicata effect of state administrative decisions and not appeals to state courts of those decisions. Nevertheless, we conclude the intent of Title VII and the language of *Alexander v. Gardner-Denver Co., supra*, indicate that in the present situation there should be a second, independent federal action even though the state agency ruling was appealed to the state courts, especially here where plaintiff did not seek the review, but was forced to defend the appeal.

Until the recent case of *Sinicropi v. Nassau County*, 601 F.2d 60 (2d Cir. 1979), federal courts deciding Title VII claims had consistently refused to give res judicata and collateral estoppel effect to state discrimination claims decided by state courts. *Kremer v. Chemical Construction Corp.*, 464 F. Supp. 468 (S.D.N.Y. 1978), *reconsidered and dismissed in light of* Sinicropi, 477 F. Supp. 587 (S.D.N.Y. 1979); *Nickel v. Highway Industries, Inc.*, 441 F. Supp. 477 (W.D. Wis. 1977); *Gilinsky v. Columbia University*, 440 F. Supp. 1120 (S.D.N.Y. 1977); *Al-Hamdani v. State University of New York*, 438 F. Supp. 299 (W.D.N.Y. 1977); *Beck v. Mather*, 417 F. Supp. 648 (W.D. Vir. 1976); *Benneci v. Department of Labor*, 388 F. Supp. 1080 (S.D.N.Y. 1975); *Young v. Southside Packing Co.*, 369 F. Supp. 59 (E.D. Wis. 1973).[5]

In *Sinicropi v. Nassau County, supra*, the Second Circuit, relying on its decision in *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977), held that res judicata effect should be given in subsequent Title VII actions to prior state court proceedings where the plaintiff chose to submit a state agency decision to review by state courts. *Mitchell* had applied res judicata in similar circumstances in a federal discrimination action brought under 42 U.S.C. § 1981. In a short per curiam opinion, the court in *Sinicropi* saw "no reason to distinguish between section 1981 and Title VII for res judicata purposes." *Sinicropi v. Nassau County, supra*, 601 F.2d at 62.

Although we question the holding in *Sinicropi*,[6] we need not decide the question before that court. An examination of the factual situation in the present case shows that *Mitchell* and *Sinicropi, supra*, are distinguishable and not controlling in our case. *Mitchell* expressly reserved deciding the question involved here, i.e. the situation where claimant was successful at the state

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[5] *Cf. Bennun v. Board of Governors*, 413 F. Supp. 1274 (D.N.J. 1976) (failure to bring Title VII action in state court when bringing state discrimination claim bars federal claim because state and federal courts have concurrent Title VII jurisdiction). This decision rests on the questionable conclusion a Title VII action can be brought in state courts, see note 4 and accompanying text *supra*, and is factually different from the case at bar since Ms. Gunther could not raise a Title VII claim in state courts because of Iowa law limiting review of agency decisions.

[6] Assuming the correctness of *Mitchell*, nevertheless there are several bases for distinguishing between section 1981 and Title VII with regard to the application of res judicata. Several district courts deciding cases after *Mitchell* and before *Sinicropi* concluded *Mitchell* should not be controlling in a Title VII action. *Gavin v. Peoples Natural Gas*, 464 F. Supp. 622, 624-26 (W.D. Penn. 1979); *Kremer v. Chemical Constr. Corp.*, 464 F. Supp. 468, 470-74 (S.D.N.Y. 1978), *reconsidered and dismissed in light of* Sinicropi, 21 Emp. Prac. Dec. 12,752 (S.D.N.Y. Sept. 20, 1979); *Nickel v. Highway Indus., Inc.*, 441 F. Supp. 477, 479 (W.D. Wis. 1977); *Gilinsky v. Columbia Univ.*, 440 F. Supp. 1120, 1121-22 (S.D.N.Y. 1977); *Al-Hamdani v. State Univ. of N.Y.*, 438 F. Supp. 299, 301-303 (W.D.N.Y. 1977).

agency level, and respondent appealed, lost, and then appealed to the appellate state court which reversed and dismissed the claimant's complaint. As noted by the *Mitchell* court, "if res judicata applies in these circumstances, then deferral to state agencies pursuant to Title VII creates the risk that, by appealing any agency determination favorable to claimant, the respondent can force the claimant into the state courts and foreclose a federal action." *Mitchell v. National Broadcasting Co., supra,* 553 F.2d at 275 n.13. We find this result unacceptable and countrary to the policies of Title VII.

We therefore conclude that while the prior state proceedings are entitled to weight in the federal district court's factual determinations, the doctrines of res judicata and collateral estoppel do not bar this subsequent Title VII action in federal court.[7]

[6](cont.)

We agree with these courts that the unique statutory scheme of Title VII supports the proposition that res judicata and collateral estoppel should not be applied. Title VII's requirement of first deferring to state remedies, 42 U.S.C. § 2000e-5(c), would be frustrated by applying a bar to federal actions because a state court had decided an appeal from a state agency decision. *Batiste v. Furnco Constr. Co., supra,* 503 F.2d at 450. Further, unlike other civil rights statutes, Title VII clearly provides for a *de novo* hearing in federal court. *Chandler v. Roudebush,* 425 U.S. 840, 844-45 (1976). The language of Title VII does not indicate Congress intended to limit this provision by giving res judicata or collateral estoppel effect to state proceedings and we would have reservations in judicially creating such a limitation. *See Benneci v. Department of Labor,* 388 F. Supp. 1080, 1082 (S.D.N.Y. 1975).

[7]Appellants urge *Montana v. United States,* 440 U.S. 147 (1979) requires the application of collateral estoppel to the Title VII action here. The Court in *Montana* stated the application of collateral estoppel in the case before it depended on three factors, (1) whether the issues presented in the federal litigation are in substance the same as those resolved in the state court; (2) whether controlling facts or legal principals have changed significantly since the state court judgment; and (3) whether other special circumstances warrant an exception to the normal rules of preclusion. 440 U.S. at 155.

For the reasons stated in our disposition of the res judicata and collateral estoppel issue, it is our view that Title VII has created a "special

Appellants' contention on the merits is that a bfoq exists upon which the state may premise its CO II classification. 42 U.S.C. § 2000e-2(e). The United States Supreme Court has held "that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Dothard v. Rawlinson,* 433 U.S. 321, 334 (1977). In formulating the rule for finding a bfoq exception, that court stated it is

> the virtually uniform view of the federal courts that § 703(e) provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities. This view has been variously formulated. In *Diaz v. Pan American World Airways,* 442 F.2d 385, 388, the Court of Appeals for the Fifth Circuit held that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." (Emphasis in original.) In an earlier case, *Weeks v. Southern Bell Tel. & Tel. Co.,* 408 F.2d 228, 235, the same court said that an employer could rely on the bfoq exception only by proving "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." See also *Phillips v. Martin Marietta Corp.,* 400 U.S. 542. But whatever the verbal formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes, * * *.

Id. at 333.

The district court properly distinguished *Dothard,* which

[7](cont.)

circumstance" which warrants an exception to the normal rules of preclusion. This is especially true where plaintiff did not seek state court review, but was forced to defend by appellants' appeal.

upheld a male bfoq for "contact positions" in the Alabama maximum security penitentiaries, from the present case involving Iowa's medium security reformatory.

> At the outset it is necessary to distinguish this case from *Dothard*, *supra* which involved the Alabama prison system, characterized by federal district court judge Frank M. Johnson as "horrendously overcrowded", "dilapidated", "filthy", and one of "rampant violence" and "inhuman conditions" which makes it constitutionally intolerable. *Pugh v. Locke*, 406 F. Supp. 318, 323-325 (M.D. Ala. 1976) modified in part 559 F.2d 283, *cert. granted* remanding on other grounds and dismissing state parties, ____U.S. ____, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978). The Supreme Court painstakingly limited its decision upholding a male bfoq in the Alabama penitentiaries to that "peculiarly inhospitable" environment. Anamosa is no rose garden; neither is it the stygian spectre which faced the Supreme Court in *Dothard*.
>
> *Gunther v. Iowa State Men's Reformatory*, 462 F. Supp. 952, 955 (N.D. Iowa 1979).

In this case the appellants have admitted Anamosa explicitly discriminates on the basis of sex in promotion to the CO II status. There is no claim that the plaintiff is unable to satisfactorily perform the duties of the CO II status, other than for the reason of her womanhood. It is therefore a prima facie case of overt sex discrimination, and the burden shifted to Anamosa to show the bfoq was reasonably *necessary* to the normal operation of the institution, 42 U.S.C. § 2000e-2(e)(1). Anamosa must establish that the sex-based requirement has "a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).[8]

[8]It is conceded here that the employment practice is overtly discriminatory, and so violates Title VII unless there is a bfoq reasonably necessary to the normal operation of the particular enterprise. 42 U.S.C. § 2000e-2(e)(1). *See* note 3 *supra*. Other cases find a facially neutral

The first contention by appellants is that security reasons allow for the bfoq exception to apply to the CO II classification. The district court determined that *Dothard* required rejecting the usual Title VII framework which would allow a plaintiff to determine for herself whether to risk the potential danger of the job, and instead, because of the prison context, balance plaintiff's Title VII rights against the possibility of disruption of the prison system. We agree with this analysis, as well as the district court's holding that, concerning the security issue, unlike *Dothard*, here the scales weigh in favor of plaintiff's rights. *Gunther v. Iowa State Men's Reformatory*, *supra*, 462 F. Supp. at 955.

Plaintiff concedes, however, that her performance of certain CO II duties involving prisoner strip searches, and surveillance of prison showers and toilets might result in a violation of inmate privacy. She therefore seeks, and the district court ordered, that she be awarded CO II status with a "functional assignment" of duties so as to protect any rights of inmate privacy which might exist.

The appellants make two arguments in response to this. The first is that because the toilets at Anamosa are located in the cells themselves, privacy interests would prohibit plaintiff from performing such a large portion of the functions performed by the other CO II's that the bfoq requirement of "reasonably necessary" to the operation of the institution is satisfied. Anamosa additionally argues that any functional

[8](cont.)
employment practice to be discriminatory in practice. This type of employment practice is justified only if it meets a judicially created "business necessity" test. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). We follow the analysis of the Supreme Court in *Dothard* in our examination of the bfoq issue, though realizing this analysis is similar to and overlaps with the judicially created "business necessity" test. *Compare, e.g., Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 387-88 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (bfoq analysis) *with Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1297-98 (8th Cir. 1975) (business necessity analysis to facially neutral statute).

assignment would require men to perform all of the high risk duties at Anamosa while women would perform only low risk duties, with both being compensated at the CO II level. It argues that this would be sex discrimination against male CO II's. We agree that if appellants' allegations were established, serious questions would be raised. In examining the evidence in the record, however, we agree with the district court that appellants have not met their burden of proof on this issue. In addition to showing that the hiring of women at Anamosa would undermine the essence of the prison administration, Anamosa must also demonstrate it could not reasonably rearrange job responsibilities in a way to minimize the clash between privacy interests of the inmates, and the nondiscrimination principal of Title VII. *Fesel v. Masonic Home of Delaware, Inc.*, 447 F. Supp. 1346, 1350-51 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979). *See Dothard, supra*, 433 U.S. at 346 n.5 (Marshall, J., dissenting).

First we note there are female CO II's at the Iowa maximum security men's penitentiary at Fort Madison, who perform limited duties. The same CO II job description applies at both institutions. Clearly prison officials at Fort Madison do not think a bfoq for the entire CO II classification is "reasonably necessary for the normal operation" of the maximum security prison there, and appellants do not adequately demonstrate how Anamosa is different.

Further, an examination of the job descriptions for CO I and CO II does not indicate one calls for more "contact position" duties than the other. In fact the "examples of work performed" list included in the job descriptions indicate there exist at least as many CO II functions as CO I functions which could be performed without invading inmate privacy. Yet administrative changes have allowed plaintiff to perform limited CO I functions without unduly disrupting the system or invading inmate privacy. Plaintiff also performs functions which are otherwise performed by CO II's.

Anamosa already adjusts work schedules so that certain

male CO II's have remained at a single job function within the CO II status for three years. If these job functions and procedures have not undermined the goals and functions of the reformatory at Anamosa, there is little reason to suggest that scheduling to avoid the invasion of inmate privacy rights by female officers would give rise to undue hardship on the prison administration. Administrative inconvenience cannot justify discrimination. *Schaefer v. Tannian*, 394 F. Supp. 1128, 1134 (E.D. Mich. 1974). Title VII requires administrative necessity, not merely administrative inconvenience, to satisfy the bfoq exception. *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). Given this evidence, we believe the district court properly concluded Anamosa failed to demonstrate that there are no reasonably available alternative practices with less discriminatory impact that would satisfy the legitimate needs of the institution. *Fesel v. Masonic Home of Delaware, Inc., supra*, 447 F. Supp. at 1350-51. See *Green v. Missouri Pacific Railroad*, 523 F.2d 1290, 1298 (8th Cir. 1975).

By upholding plaintiff's claim in the present action, we are not holding that Anamosa could not possibly create a bfoq exception relating to some job functions for correctional officers at the men's reformatory. A proper classification narrowly drawn indicating that most of the duties of that classification would involve shower and toilet surveillance, strip searches and related duties necessary to inmate privacy may satisfy a bfoq for males at Anamosa, or females at a women's institution. We need not decide that question. What we do hold is that Anamosa's current classification system violates Title VII because it impermissively attempts to establish a bfoq which has the effect or prohibiting any advancement in a person's chosen field beyond a CO I level because that person is a woman. Advancement to CO III and CO IV levels requires first working as a CO II. Anamosa has failed in its burden of demonstrating that the entire job classification of CO II meets Title VII's

"extremely narrow" bfoq exception in employment discrimination.[9]

The district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[9]We agree with the comment of Justice Reynoldson of the Iowa Supreme Court in his dissent from that court's decision in this controversy. He was of the view that the conclusion reached at the state agency level (which essentially is our result here) would create "still another irrational classification in a system which, at least as it relates to [the Iowa Men's Reformatory], is riddled with inconsistancies." *Iowa Dept. of Soc. Serv. v. Iowa Merit Employ. Dept., supra,* 261 N.W.2d at 170 (Reynoldson, J., dissenting). Justice Reynoldson would have remanded the case to the I.M.E.C. to establish new job classifications. We do not have the I.M.E.C. as a party to this litigation, and Justice Reynoldson's view is not an option available to us. As a practical matter, however, it would appear possible to resolve this controversy by reclassifying the job descriptions giving consideration to the factors enumerated in Justice Reynoldson's dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

CYNTHIA GUNTHER,	*	
	*	
Plaintiff,	*	
	*	NO. C 77-73
vs.	*	
	*	
IOWA STATE MEN'S REFORMATORY and KEVIN J. BURNS, Commissioner of the Iowa Department of Social Services,	*	ORDER
	*	Filed January 5, 1979
	*	
	*	
Defendants.	*	

This matter is before the court on the parties' cross-motions for summary judgment filed by plaintiff August 21, 1978 and defendant August 28, 1978, and plaintiff's unresisted motion to substitute Victor Preisser as party defendant in place of Kevin Burns, pursuant to FRCP 25(d)(1). Plaintiff's motions granted; defendants' denied.

Background

In September, 1974, plaintiff was employed as a Correction Officer I (CO I) at the Iowa State Men's Reformatory[1] at

[1]Like most penal institutions in this country, the Iowa Men's Reformatory at Anamosa is segregated by sex and housed 722 men in

Anamosa (Anamosa) having qualified by education for the position of Correction Officer II (CO II). After working as a CO I she applied for a promotion to CO II status which was denied on the basis of sex.

As a CO I she has performed some duties also performed by CO II's and has not been able to do all duties of a CO I because of her sex. She requested special training in riot control and self-defense which was available to male officers and was turned down.

After her request for promotion to CO II was denied, she filed a grievance with the Iowa Merit Employment Commission which found that she was entitled to promotion. The state appealed to the Iowa District Court in and for Polk County which upheld the Commission's ruling. In December, 1977 the Iowa Supreme Court overturned the administrative ruling and lower court decision and found that under Iowa law there existed a bona fide occupational qualification exception (bfoq) on which the state could premise CO II classification according to sex.

This complaint was filed prior to the Iowa Supreme Court's ruling and pursuant to Title VII of the Civil Rights Act, 42 USC § 2000(e)[2] *et seq.* Plaintiff claims she was denied promotion solely because she is a woman and that there exists no bfoq which would justify sex discrimination.

Defendants' motion for dismissal on grounds of res judicata was denied on the basis that while similar, the state and federal laws dealing with sex discrimination create separate causes of action and may be subject to different standards. In

[1](cont.)
June, 1975. The great majority of inmates live in galleries in two cell houses where bodily functions are performed in open view of the guards and other inmates.

About one-third of the inmates were serving time for violent crimes. Approximately 3.3 per cent of the total inmate population were convicted rapists.

[2] 42 USC § 2000e-2(a) states:
It shall be an unlawful employment practice for an employer --

addition, the time schedule established by Title VII prevented the Commission's case and plaintiff's from being consolidated. While respecting the state court's findings and conclusions, this court is bound to consider the facts independently in light of federal law.

The parties have submitted this case on cross-motions for summary judgment to be decided on the record before the commission and judicial tribunals.

The single issue to be decided is whether Iowa's rules preventing women from obtaining jobs above the Correction Officer I level at the Men's Reformatory at Anamosa fall within the "extremely narrow" bfoq exception to Title VII's general prohibition against sex discrimination. Title VII § 703(e), 42 USC § 2000e-2(e)[3]. *See Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

Title VII was meant to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other

[2] (cont.)

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[3] In relevant part, 42 USC § 2000e-2(e) states:
Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). A number of standards have been proferred for determining whether a bfoq exists. However, the federal courts are in agreement that refusing to hire a woman on the basis of stereotyped characterizations is prohibited. *See Dothard, supra*, at 333 and citations at n.17.

At the outset it is necessary to distinguish this case from *Dothard, supra* which involved the Alabama prison system, characterized by federal district court judge Frank M. Johnson as "horrendously overcrowded", "dilapidated", "filthy", and one of "rampant violence" and "inhuman conditions" which makes it constitutionally intolerable. *Pugh v. Locke*, 406 F.Supp. 318, 323-325 (M.D. Ala. 1976) modified in part 559 F.2d 283, *cert. granted* remanding on other grounds and dismissing state parties, 46 USLW 3802 (U.S. July 3, 1978). The Supreme Court painstakingly limited its decision upholding a male bfoq in the Alabama penitentiaries to that "peculiarly inhospitable" environment. Anamosa is no rose garden; neither is it the stygian spectre which faced the Supreme Court in *Dothard*.

Although *Dothard* is distinguishable on the basis of differences between prison conditions and inmate populations in Alabama and Anamosa, it provides an analytical framework for assessing the proferred bfoq in this case. The Supreme Court rejected the usual policy which would allow each woman to determine for herself whether to risk the potential consequence of taking a contact position within a prison and instead employed a balancing test which weighs Title VII rights against the possibility and probability of disruption of the prison system.

That balancing test would seem applicable to all prison contexts. However, the probabilities of sexual assaults on female correction officers at Anamosa and the potential impact on prison discipline and rehabilitation opportunities is not of the degree as would warrant an exception to Title VII's proscriptions. The Supreme Court was considering a brutal,

jungle-like maximum security environment in Alabama. Defendant's witness Calvin Auger, the warden at Anamosa, classified his institution as a medium security facility. In balancing the plaintiff's rights against institutional stability -- an important and legitimate goal -- the Supreme Court has mandated that courts and administrative bodies weigh probabilities of instability. In *Dothard* the balance tipped toward recognizing a bfoq. In this case it tips toward recognition of plaintiff's rights.

In the case at bar defendants have admitted discriminating on the basis of sex. Thus a prima facie case of discrimination has been established and it becomes the defendants' burden to show that the sex-based requirement has "a manifest relationship to the employment in question." *Griggs v. Duke Power Co., supra* at 432; *Knott v. Missouri Pac. R. Co.*, 527 F.2d 1249, 1251 (8th Cir. 1975).

Defendant has repeatedly asserted that placing women in contact positions within the institution would: (1) violate prisoners' privacy rights; (2) jeopardize prison security and rehabilitative programs; (3) put the guards, both male and female, in increased danger; and (4) lead to major disciplinary problems. In addition, they claim that allowing women to achieve CO II status and fashioning a rotation to avoid placing them in dangerous areas or in areas where inmate privacy must be maintained would be unfair to male officers and would create serious administrative problems.

Plaintiff acknowledges that assignment to certain duties would create a privacy problem.[4] Although she initially

[4]The question of inmate privacy is not so clearly answered as defendants assert. Prisoners' constitutional rights survive incarceration but are subject to requirements of order and security. *See Pell v. Procunier*, 417 U.S. 817, 823 (1974). Constitutional rights must be balanced against "legitimate penological objectives of the correctional system." *Id.* at 822.

Here defendants seek to raise prisoners' privacy rights which certainly are not those enjoyed by private citizens in an open society. It is not clear that these rights may be raised by defendants except as they relate to order and other legitimate purposes of the institution. Such privacy is not so much an objective commodity as it is a subjective concept to be measured by the administration's perception of the impact of female CO

requested general CO II duties she now does not seek assignment to areas which would require surveillance of

[4] (cont.)
II's working in areas which require monitoring toilet and shower facilities. On this record there is only speculation as to how inmates would react to a woman under such circumstances, and how reaction, if any, would affect legitimate goals. If a ruling were based on privacy interests further proceedings would be required. However, it is unnecessary to reach the privacy question as plaintiff seeks only CO II classification with limited functions and this court believes that such classification is required in these circumstances.

The issue of privacy rights per se is best reserved to a case in which they are raised fully by proper parties. For the present it is enough to note that in an environment such as that at Anamosa where prisoners live in various degrees of exposure, are often viewed by guards while showering and excreting, and are in constant view of their fellow inmates, privacy already has been seriously eroded.

In addition, more as to being viewed naked by members of the opposite sex under certain circumstances are bound to change as women become further integrated into the occupational and professional world. *See Dothard v. Rawlinson*, 433 U.S. 321, 346 n.5 (Marshall, J., dissenting). The traditional rule that only male guards may view male inmates under these conditions may derive from just the type of stereotypical value system condemned by Title VII.

The court is familiar with the cases cited by defendants and the Supreme Court of Iowa in *Iowa Dept. of Social Serv. v. Iowa Merit Emp. Dept.*, 261 NW2d 161, 165 (Iowa 1977) but believes each is factually distinguishable. This is not a case of potential infringement of a clothing customer's privacy as in *Hodgson v. Robert Hall Clothes, Inc.*, 326 F.Supp. 1264, 1269 (D. Del. 1971). Nor is this a question of who will perform a search of a body cavity without at least "a real suspicion" that a private citizen crossing a border is concealing contraband. *See Henderson v. United States*, 390 F.2d 805, 807-808 (9th Cir. 1967). Neither are prisoner's privacy rights analogous to those of a female complainant in an assault case who is required to be photographed nude by a male police officer who then developed and printed the pictures and distributed them to other police officers. *See York v. Story*, 324 F.2d 450 (9th Cir. 1963). The California and Pennsylvania state court cases cited either are questionable as to application of federal law, *[see Long v. California State Personnel Board*, 116 Cal. Reptr. 562 (Ct. App. 1974)] or based on facts peculiar to youth authority facilities [*In re long*, 127 Cal. Reptr. 732 (Ct. App. 1976); *City of Philadelphia v. Pennsylvania Human Relations Commission*, 300 A.2d 97 (Pa. Commw. Ct. 1973)].

prisoners while they take showers or use toilet facilities. Nor does she request assignments which would require her to strip search inmates.

Whether a legitimate bfoq exists depends on the answers to three closely interrelated questions which generally address the issues of whether a bfoq is reasonably necessary for the proper administration of the institution:[5] (1) Would the essense of the institution and its goals be undermined by not hiring men only? (2) Is there reasonable cause to believe, that is a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job? and (3) Would any personnel adjustments caused by hiring female CO II's substantially impringe on the efficient and effective operation of the facility? The state urges all questions be answered in the affirmative. The court agrees with plaintiff that each should be answered "no".

Essence of Prison Administration

Security and order are essential. Surveillance of inmates in the cell blocks and shower rooms appears to be important to these goals.

Plaintiff admits that assigning female officers to shower and cell surveillance might constitute an invasion of inmate privacy. The Iowa Supreme Court concluded that full time surveillance constitutes the core of the institution's functions and that adjustments which would mitigate the privacy problem and allow women to perform limited CO II functions could not be imposed under the Iowa Civil Rights Act or Merit System Act. Title VII dictates otherwise. Privacy is certainly to be respected but the essence of the facility is not a function of having all personnel available to work in all areas. Balancing the federal right not to be discriminated against in employment

[5] As the Fifth Circuit Court of Appeals stated in *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971), the statute requires a "business *necessity* test, not a business *convenience* test." (Emphasis in original). *See also Weeks v. Southern Bell Telephone & Telegraph Company*, 408 F.2d 228, 235 (5th Cir. 1969).

against the administrative inconveniences of functional scheduling dictates institutional adjustments which will not substantially affect the efficient operation of the facility or undermine its essential functions. Administrative inconvenience cannot justify discrimination. *Schaefer v. Tannian*, 394 F.Supp. 1128, 1134 (E.D. Mich. 1974). *See Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

In this context, adjustments may be made without jeopardizing privacy rights of prisoners or disrupting efficient management or core goals. There are a substantial number of jobs within the facility which can be performed by a qualified female CO II just as well as by a qualified male. Accepting defendants' claims of a need for flexibility among staff members, it is difficult to imagine emergency situations in which trained women would not be able to function. Of course, the area of inmate strip searches may be left to male officers. *But see* note 4, *supra*. Any inconvenience in scheduling cannot outweigh plaintiff's rights. In addition, it is noted that women hold positions as CO II's at the state's maximum security facility at Fort Madison, though they perform limited and non-contact duties.

Safe and Efficient performance

Testimony established that any officer, male or female is equally subject to assault. Sexual assault on female officers may be of higher probability than for males. However, as far as impact on prison discipline is concerned, an assault is an assault. A sexual assault would only be more destructive if of its very nature it led to major disruption. There is no evidence to support that possibility. The experience of using female officers in contact positions in other state and federal prisons indicates that the fears voiced by the state and state Supreme Court are highly speculative and based on stereotypical views of "macho" roles among prisoners and a woman's inability to cope with the psychological and physical problems inherent in a prison environment. *See Dothard, supra* at 341 (Marshall, J., dissenting).

Institutional Adjustments

The state contends that adjusting assignments so that women can qualify for CO II positions in non-privacy areas would be economically and administratively unsound and unfair to male co-workers who perform the gamut of CO II duties. None of these reasons, alone or aggregated, is grounds for denying women their right not to be discriminated against in employment opportunity. The state has adjusted its work schedules so that certain men at Anamosa have remained at a single job under CO II status for up to three years. Defendants' witnesses admitted that none of the other CO II's have complained. At any rate, if complaints of fellow workers were grounds for a bfoq, Title VII could be gutted by the gripes of entrenched employees. Clearly job assignment adjustments within the facility in the past have not undermined its essential goals or functions. While there may be a valid reason to limit certain of the functions of female correction officers, there is no legal reason to cut them off completely from CO II classification and the opportunities that classification offers. With the proper training (already offered to male employees) female officers should be as able as their male counterparts in dealing with everyday problems and emergencies.

To state, as do defendants, that if women cannot qualify for contact positions and the necessary training, they will not have the experience to deal with contact problems, is tautological. Only those who cling to impermissible and outdated stereotypes can believe that a well trained, committed female corrections officer could not deal with problems at this particular facility on a par with her male counterparts. Emergencies would not generally involve privacy problems and it should not be a hardship for male correction officers to conduct necessary strip searches of male inmates. Plaintiff already performs such searches on female visitors.

Summary judgment under FRCP 56 is available where the overall record establishes that there is no genuine issue of material fact, and that one party is entitled to judgment as a

matter of law. *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962); *Stifel, Nicolaus & Co., v. Dain, Kalman & Quail*, 430 F.Supp. 1234, 1237 (N.D. Iowa 1977) affirmed in part, reversed in part on other grounds, 578 F.2d 1256 (8th Cir. 1978).

Each party has made its record as to the nature of the facility, potential impact of allowing women to perform contact jobs, and the relative abilities of males and females in performing those duties. No genuine issues of material fact remain outside the record which would prevent summary judgment. Defendants have patently failed to bear their burden of proving that a fboq was reasonably necessary to the normal operation of the Iowa State Men's Reformatory at Anamosa or that denial of a bfoq would create a reasonable possibility of a breakdown of the legitimate governmental interests discussed above. *See Procunier v. Martinez*, 416 U.S. 396, 413-414 (1974).

Similarly, defendants have failed to show that there are no reasonably available alternative practices with less discriminating impact that would satisfy the legitimate needs of the institution. *See Green v. Missouri Pacific Railroad Company*, 523 F.2d 1290, 1298 (8th Cir. 1975). In fact functional assignment within the CO II classification is just such an alternative.

It is therefore

ORDERED

1. Motion to substitute parties granted.
2. Plaintiff's motion for summary judgment granted.
3. Defendant's motion for summary judgment denied.
4. Defendant is permanently enjoined from engaging in further acts of discrimination against plaintiff on account of her sex.
5. Plaintiff shall be promoted as of the date of this order to rank of Correctional Officer II with all rights, benefits, training and salary thereof. Award of salary and other benefits will be made retroactive to a date still to be determined by this

court, unless by January 19, 1979 the parties stipulate as to those damages. In the event no stipulation is agreed upon, the parties shall submit briefs and affidavits by January 26, 1979 as to the dates on which, after completing work as a CO I, plaintiff requested and was denied CO II classification. Final judgment will be entered upon resolution of the damages issue.

6. Attorney's fees will be awarded pursuant to 42 USC § 1988. Plaintiff shall submit by January 26, 1979 affidavits detailing such fees. Defendant shall have until February 9, 1979 to respond.

January 5, 1979.

Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE SUPREME COURT OF IOWA

IOWA DEPARTMENT OF SOCIAL SERVICES, IOWA MEN'S REFORMATORY,

Appellant

vs.

IOWA MERIT EMPLOYMENT DEPARTMENT, IOWA MERIT EMPLOYMENT COMMISSION, AND CYNTHIA GUNTHER,

Appellees

Filed December 21, 1977

236
59913

Appeal from Polk District Court -- Anthony M. Critelli, Judge.

Appeal by appointing authority from judgment of the trial court affirming decision of the Iowa Merit Employment Commission. -- Reversed.

Richard C. Turner, Attorney General, and Stephen C. Robinson, Special Assistant Attorney General, for appellant.

Larry L. Seckington, of Des Moines, for appellee Iowa Merit Employment Commission.

Gordon E. Allen, of Des Moines, for Appellee Gunther.

En banc.

HARRIS, J.

This dispute between two state administrative agencies arose from the attempt of Cynthia Gunther (the intervenor) to raise her employment classification at the men's reformatory. The Iowa department of social services, men's reformatory (the department) has the ultimate responsibility for the operation of the men's reformatory at Anamosa. The Iowa merit employment department, Iowa merit employment commission (the commission) is charged with enforcing the Merit System Act (ch. 19A, The Code). The controlling question is whether a bona fide occupational qualification exception (BFOQ) exists which prevents a woman employee from undertaking the duties of a reformatory corrections officer II (CO II). The trial court determined no BFOQ existed for the position. The trial court ordered the intervenor to be placed in the CO II classification. At the same time the trial court ordered, in view of the intervenor's status as a woman, that she be exempted from certain duties routinely required of men in the same classification. We agree there are certain duties routinely required of a CO II which, as a practical matter, are impossible for a woman to perform. We believe such impossibility renders the CO II classification a proper subject for a BFOQ. We reverse the trial court.

The most significant facts in this dispute are (1) that all inmates of the Iowa men's reformatory are males, and (2) the intervenor is female.

Under the statutory scheme for punishment of public offenders in Iowa it is contemplated that the older criminals and recidivists should be committed to the men's penitentiary at Fort Madison. § 789.16, The Code. The men's reformatory at

Anamosa is generally considered a medium security facility. On the other hand the legislature provided a scheme for ready transfers between the penitentiary and the reformatory. §§ 246.12, 246.13, 246.14, The Code. Thirty-five percent of inmates at the reformatory have been convicted of crimes of violence, including sex offenses. Clearly the inmate population at the reformatory has a far greater tendency to violence than does the general population. The inmates are deprived of normal sexual experiences. Many of them react spontaneously with little thought of consequences.

The correction officers who make up the operating personnel of the reformatory are of four classifications. The first classification is that of correction officer I (CO I). This is generally the beginning classification for a new officer at the reformatory. A CO I rotates through various tasks on a somewhat limited basis. A number of officers, by reason of age, physical condition, or perhaps for various other reasons are never elevated beyond the CO I classification.

CO II's are subject to general duty throughout the institution. They can perform all the functions of a CO I and significant additional tasks such as riot control, patrol of cell blocks, and superintending inmates' bath and shower rooms. CO II's conduct frequent "pat searches" and "strip searches" of the inmates. While patrolling cell blocks CO II's are in full view of the cells themselves. They can, and frequently do, view the inmates' toilet. In general CO II's are in much closer and direct personal contact with the inmates than are CO I's. The record is clear a female CO II would be in very real danger of sexual attack.

Some CO II's advance to higher classifications as CO III and CO IV officers. Some CO II's do not so advance. With each advancement authority and pay increase.

Petitioner is a four-year college graduate. Except for her sex and lack of institutional experience there is no question that, with additional training, she would possess the qualifications of a CO II officer. When employed as a CO I officer she

was assigned duty in the visitors' rooms, central control, and tower watch. Eventually she sought advancement to CO II which will cause her to be rotated through all assignments. Because some assignments as a CO II officer would be impractical for any woman the department refused to promote her. The department also refused to create a distinct classification for her by calling her a CO II and omitting the duties she could not perform. Petitioner thereafter appealed to the merit commission which ruled in her favor. The commission directed that she be given the CO II classification but in effect created a new and distinct classification by exempting her from "pat" or "strip" searches and from assignments to the cell blocks.

On appeal the trial court affirmed the merit commission "* * * with the common sense exemption noted both by the agency below and the *Reynolds* court [Reynolds v. Wise, 375 F.Supp. 145 (N.D. Tex.)] that these officers should not be placed in job duties that may reasonably be expected to breach inmates justified expectations of personal privacy." The reformatory appealed to this court. There is no cross-appeal.

I. All parties concede the intervenor cannot perform all tasks routinely assigned to male CO II's. In her brief and argument intervenor states:

"Admittedly there are certain job duties and job functions which the intervenor cannot perform either because of inmate privacy rights, or the necessity to avoid compromising positions. However, that is not to say that the intervenor cannot be promoted through the classification system. * * *." (Emphasis added.) The commission eliminated from the intervenor's duties "* * * assignment to dormitories [cell houses?] or shakedown * * * to insure privacy."

For reasons which will appear we agree and hold the intervenor's womanhood prevents her from performing all CO II functions at the men's reformatory.

II. The parties point to provisions of different but somewhat related Code chapters. The department points to chapter 601A, The Code (Iowa Civil Rights Act of 1965).

Section 601A.6(1)(a) provides in part:

"It shall be an unfair or discriminatory practice for any * * * [p]erson to refuse to hire, accept, register, classify, or refer for employment, to discharge an employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of * * * sex * * * *unless based on the nature of the occupation [the BFOQ exception]*. * * *." (Emphasis added.)

The commission points to chapter 19A, The Code, (the Merit System Act). Section 19A.18 provides:

"No person shall be appointed or promoted to, or demoted or discharged from, any position in the merit system, or in any way favored or discriminated against with respect to employment in the merit system because of his * * * sex * * *." Chapter 19A contains no BFOQ clause.

Section 19A.22 provides:

"The provisions of this chapter, including but not limited to its provisions on employees and positions to which the merit system apply, shall prevail over any inconsistent provisions of the Code and all subsequent Acts unless such subsequent Acts provide a specific exception from the merit system."

The commission argues the absence of a BFOQ from chapter 19A combined with the provisions of 19A.22 show the legislature intended to deny any BFOQ exemption for Iowa merit employees such as the intervenor.

Before addressing the commission's contention a threshold problem should be mentioned. We have noted the commission held for the intervenor but excepted her from performing the duties which would form the basis for the BFOQ. The commission's order was affirmed by the trial court. Neither intervenor nor the commission cross-appealed when the department brought this appeal. It is suggested the failure of the intervenor or the commission to cross-appeal makes it unnecessary to consider whether a BFOQ exists for any merit employees. However we believe the absence, under these circumstances, of a cross-appeal does not conclude the question.

The commission could scarcely appeal from a district court's total affirmance of its own decision. Nor would we expect the intervenor to appeal from a ruling granting her CO II status and pay without any obligation to perform the duties her brief concedes she cannot perform.

Turning to the two Code chapters referred to we do not believe the legislature's failure to include a BFOQ provision in § 19A.18 indicates a total prohibition of BFOQ provisions for that chapter. We note that § 356.5(6), The Code, requires jailers "[t]o have a matron on the jail premises at all times during the incarceration of any one or more female prisoners * * *."

We do not think the department of transportation is prohibited from hiring male attendants for male restrooms or females for female restrooms in highway rest stops. But the commission's interpretation of § 19A.18, precluding BFOQ exceptions, would make such hiring practices impossible. Similarly, we do not believe male officers could be required, for lack of a BFOQ clause, for a CO II position at the women's reformatory at Rockwell City.

In any event the absence of a BFOQ provision in § 19A.18 could not justify an unconstitutional invasion of the inmates' rights to human dignity and privacy.

Consideration of inmates' constitutional rights requires mention of another threshold question. Were the inmates' constitutional rights an issue raised in these proceedings? We think the answer is plainly yes.

The inmates' constitutional right of privacy was an issue at every step in these proceedings. In his opening statement before the commission the intervenor's counsel stated "* * * [T]he appointing authority will want to tell you that it [placing females in CO II position] endangers the privacy of the particular inmate * * *." Much evidence was devoted to the privacy rights of inmates including the department's exhibits 8 and 9. We note also that the commission's final ruling recognized the constitutional right of privacy and expressly exempted the intervenor from certain assignments "to insure

inmate privacy."

The trial court observed the commission had found inmate privacy rights were involved and further found "* * * these [female] officers should not be placed in job duties that may reasonably be expected to breach inmates' justified expectations of personal privacy."

On appeal the department's brief urges the commission's ruling was based on an error of law in that sex must be a BFOQ because otherwise inmates' right to privacy would be violated. Finally, intervenor's brief on appeal expressly concedes the point: "Admittedly there are certain job duties and job functions which the intervenor cannot perform either because of inmate privacy rights, or the necessity to avoid compromising positions. * * *."

The parties, the commission, and the trial court conceded the obvious when they recognized the existence of a personal right of privacy with respect to one's own body and bodily functions. Such a right is guaranteed by several provisions of the federal constitution. See Hodgson v. Robert Hall Clothes, Inc., 326 F.Supp. 1264, 1269 (D.C. Del. 1971); Henderson v. United States, 390 F.2d 805, 807-808 (9 Cir. 1967). See also York v. Story, 324 F.2d 450, 455 (9 Cir. 1963) where it is said: "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self respect and personal dignity."

In general prisoners possess sensibilities to exposure of the body and its functions approximating those of people in a free society. See Schwartz, *Deprivation of Privacy as a "Functional Prerequisite": The Case of the Prison*, 63 J. Crim. L. C. & P. S. 229 (1972).

Of course, "* * * [l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. * * *." Price v. Johnston, 334 U.S. 266, 285,

68 S.Ct. 1049, 1060, 92 L.Ed. 1356, 1369 (1948). See Jones v. North Carolina Prisoners' Union, _____ U.S. _____, _____, 97 S.Ct. 2532, 2538, 53 L.Ed.2d 629, 638 (1977); Pell v. Procunier, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495, 501 (1974).

However to the extent consistent with those considerations, prisoners retain a residuum of constitutional rights. Wolff v. McDonnell, 418 U.S. 539, 556-572, 94 S.Ct. 2963, 2974-2982, 41 L.Ed.2d 935, 950-960 (1974); Kelly v. Brewer, 525 F.2d 394, 399 (8 Cir. 1975); Teterud v. Burns, 522 F.2d 357, 359 (8 Cir. 1975); Rudd v. Ray, 248 N.W.2d 125, 128 (Iowa 1976).

It is not suggested by any party the exposed cells of the reformatory should be modified. No one suggests supervision of prisoners as they toilet or shower can be eliminated. No one claims strip searches of the inmates can be abandoned. It seems such continuous supervision by male guards will be necessary security requirements at the reformatory. It is apparent, and is undisputed, there would be a constitutional violation of inmates' rights if the guards were women. Cases from other jurisdictions indicate continuous surveillance by one of the opposite sex violates a right of personal privacy. In re Long, 53 Cal.App.3d 788, 127 Cal.Rptr. 732 (1976); Long v. California State Personnel Board, 41 Cal.App.3d 1000, 116 Cal.Rptr. 562 (1974); City of Philadelphia v. Pennsylvania Hum. Rel. Com'n. 7 Pa. Comwlth. Ct. 500, 300 A.2d 97 (1973).

We hold the absence of a BFOQ provision in § 19A.18 cannot justify an invasion of inmates' constitutional rights. Accordingly the decision of the commission was "[a]ffected by * * * [an] error of law", under 17A.19(8)(e), The Code. Hence the decision of the commission must be reversed if "* * * substantial rights of the petitioner have been prejudiced. * * *."

III. The question then becomes whether substantial rights of the department of social services have been prejudiced. Section 17A.19(8), The Code. The commission and trial court

both determined no substantial rights were prejudiced. This determination followed the commission's acceptance of the intervenor's claim that classification can be distinguished from job duties and functions. Intervenor again urges on appeal the privacy rights of inmates can be a justification only for limitations placed on job functions but cannot form the basis for job classification. But a job classification is a description of its component parts. It is made up of its duties and functions. Moreover, under the law, a position classification must be "* * * based upon duties performed and responsibilities assumed. * * *." Section 19A.9(1), The Code. Accordingly, the commission's rules define a "class" as "one or more positions, which are sufficiently *similar in duties and responsibilities*, that each position in the group can be given the same job title, require the same minimum qualifications as to education and experience, can be filled by substantially the same test of ability or fitness, and that the same schedule of pay can be applied with equity to all positions in the class *under the same or substantially the same employment conditions.*" (Emphasis added.) Section 570-1.1(8) I.A.C. The same rules define "classification plan" as "* * * the orderly arrangement of positions within the classified service into separate and distinct classes, so that each will contain those portions *which involve sustantially similar* or comparable skills, duties, and responsibilities." (Emphasis added.) Section 570-1.1(10) I.A.C.

We come then to the central and fighting issue in this suit. Are the duties which the intervenor cannot perform crucial to her job classification? If not the commission and trial court were right in ordering the intervenor to be classified as CO II and at the same time exempting her from performance of those duties. We fully recognize and subscribe to the goals of the Iowa Civil Rights Act of 1965 and the Merit System Act. At the same time we think it is more than apparent that, under the facts in this case as found by the commissioner, the duties the intervenor cannot perform are the very core and substance of the CO II classification.

The commissioner's findings of fact were supported by the record. They can be summarized as follows:

a. Cell houses and other areas frequented by CO II's are places where bodily functions are performed and showers taken in full view of correctional officers at all times.

b. By reason of the physical arrangement at the reformatory, the spacing of buildings, towers, etc., there are places which cannot be observed from towers or by other means so that correctional officers on general duty are frequently alone with inmates. Even where more than one officer is on duty in an area the officers are normally not in view of one another.

c. Daily required "pat searches" of inmates are an essential duty of a CO II.

d. Strip searches are frequent and, although usually two officers are present, one could not be a woman.

e. No place in the reformatory could be considered safe from danger. A female would be more subject to an assault, especially a sexual assault.

f. Surprise is essential for a correction officer. To announce a correctional officer's presence in order to avoid embarrassment of inmates would eliminate this important factor for effective performance.

g. It would be economically unsound, would present serious scheduling problems, would destroy essential flexibility in the assignment of CO II's, and cause discontent among male CO II's to limit the functions of a female CO II.

j. The question of invasion of the privacy of inmates by a female CO II is so serious it could cause protest if females worked in certain areas. This would lead to serious confrontation if the protests were ignored. Male inmates have fixed ideas as to female roles. Confrontations and testing are certain to be frequent.

k. The inmate population at the reformatory has a greater tendency to violence than does the general population. Inmates react spontaneously with little thought of consequences and without mature judgment. Anything which upsets

the balance ignites these factors, affects the rehabilitation program, and requires countermeasures (which always take time) in order to get things back to normal.

l. There have already been inmate protests concerning their privacy because the intervenor worked in the tower. This example of the reactions of the male inmates is typical.

From the findings we conclude it is impossible to separate the CO II classification from the duties the intervenor cannot perform. A CO II is an officer whose essential function, though flexible, demands the closest personal contact with reformatory inmates. Physical contact and intimate surveillance are essential and common. It is apparent that the basic distinction between CO I's and CO II's lies in the ability of CO II's, by such personal contact, to bring the authority of the institution to bear directly on the person of each inmate. This conclusion is supported by the fact some CO II's, because of advancing age, or fear, voluntarily take demotions to a CO I classification, and "sit it out on the tower before they retire."

We do not believe the institution should be required to substantially adjust its physical plant or procedure in order to support the imposition of a classification. The following from Long v. California State Personnel Board, supra, 41 Cal.App.3d at 1015, 116 Cal.Rptr. at 572 (3 Dist. 1974) is pertinent:

"Argument was presented and even evidence to the effect that physical adjustments could be made to prevent these incidents. [Potential sexual attack on a woman chaplain by male prisoners.] Security guards could be hired, alarm systems could be expanded, buildings could be moved, and procedures changed. However, we do not view the duty of an employer to refrain from discrimination based upon sex as requiring him to alter substantially his facility and procedure to suit the sex of the person involved. Certainly reasonable adjustments should be made, otherwise equal protection rights of either sex could be thwarted by contrived nonsensical conditions."

Under the closely similar federal civil rights acts, 42 USC 2000e-2(e), a discriminatory practice cannot be justified by

administrative convenience, Schaefer v. Tannian, 394 F.Supp. 1128, 1134 (E.D. Mich. 1974), or in the private sector by a "business purpose." Robinson v. Lorillard Corporation, 444 F.2d 791, 796-797 (4 Cir. 1971). On the other hand it is permissible to discriminate on the basis of sex on the ground of "business necessity", that is, where the practice is "necessary to the safe and efficient operation of the business." *Robinson*, supra, 444 F.2d at 797-798. The civil rights act permits reasonable classifications of employees based on sex, and an employer is required to neither pattern a job for a woman or a man, nor accept an inefficient mode of operation. 14 C.J.S. Supp., Civil Rights, § 68, p. 120 (1974). See Dothard v. Rawlinson, _____ U.S. _____, _____, 97 S.Ct. 2720, 2728, 53 L.Ed.2d 786, 799 (1977) n. 14.

We hold the decisions of the commission and the trial court prejudice the department's substantial rights and were spawned by an erroneous understanding of the law.

IV. Last we must determine whether to remand the cause for further proceedings. It is suggested further proceedings would be appropriate, in the light of our determination of the foregoing, and especially in the light of the decision in *Dothard v. Rawlinson*, supra. But we do not believe the cause should be remanded. Under the established and undisputed facts in the case, and the legal principles hereinbefore discussed, the department should not be required to classify the intervenor as a CO II. The judgment of the trial court is hereby reversed.

REVERSED.

All Justices concur except Uhlenhopp, J., who dissents in which McCormick, J. joins, and Reynoldson, J., who dissents.

#236 Iowa Dep't of Social Services
v. Iowa Merit Employment Dep't

UHLENHOFF, J. (dissenting).

The question is not whether *this court* should hold that women may work in male prisons. Rather, the question is

whether this court should overturn the decision of the responsible *administrative agency* on that issue. I part company with the court majority over the role of this court vis-a-vis the role of the administrative agency.

In 1967 our legislature enacted the Merit System Act creating the Iowa Merit Employment Department under the general jurisdiction of the Merit Employment Commission. That department through the commission is the agency charged with administering the merit employment laws which protect covered state workers such as Gunther. 62 G.A. ch. 95 (Code 1977, ch. 19A). One of those laws prohibits discrimination in employment practices on account of sex, in the following unequivocal language in § 18 of chapter 95 (Code 1977, § 19A.18):

> No person shall be . . . in any way . . . discriminated against with respect to employment in the merit system because of his . . . sex . . . .

In 1969 the legislature further strengthened the Merit System Act by adding this section:

> The provisions of this chapter including but not limited to its provisions on employees and positions to which the merit system apply, shall prevail over any inconsistent provisions of the Code and all subsequent Acts unless such subsequent Acts provide a specific exemption from the merit system. 63 G.A. ch. 79, § 8 (Code 1977, § 19A.22).

The legislature authorized the Merit Employment Commission to hold hearings and render decisions in administering the act. 62 G.A. ch. 95, § 14 (Code 1977, § 19A.14). The commission accordingly promulgated rules for such hearings and decisions. 570-Ch. 15(19A) IAC. Both the act and the rules provide for appeal to the courts under the Administrative Procedure Act (chapter 17A of the Code). 62 G.A. ch. 95, § 14 (Code 1977, § 19A.14); 570-15.4(19A) IAC.

The existing rigid employee classification system at the Reformatory in fact freezes women in the lowest class, Correctional Officer I. Gunther challenged this system and proceeded through the proper steps prescribed by the commission's rules to a hearing and decision by the commission, which held for her. The commission found that women can perform some functions in the Reformatory, and that the Reformatory may not impose an inflexible employee classification system which prevents Gunther and other qualified females from advancing from Correctional Officer I to Correctional Officer II, and so on up the ladder. The commission did, however, include a sensible exception for functions involving undue compromise of residents' bodily privacy or unreasonable hazard. The Reformatory as the appointing authority appealed to district court under the Administrative Procedure Act from the commission's decision. That court affirmed. The Reformatory then appealed to this court, as the Administrative Procedure Act also permits. Gunther did not by cross appeal challenge the exception relating to invasion of privacy or undue hazard.

The judicial review in district court and in this court permitted by the Administrative Procedure Act is not de novo; on the contrary, it is restricted. See Hoffman v. Iowa Dep't of Transportation, 257 N.W.2d 22 (Iowa). Under that act, courts may intrude upon agency action only if substantial rights of the petitioner have been prejudiced because the agency action is

a. In violation of constitutional or statutory provisions;
b. In excess of the statutory authority of the agency;
c. In violation of an agency rule;
d. Made upon unlawful procedure;
e. Affected by other error of law;
f. In a contested case, unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole; or
g. Unreasonable, arbitrary or capricious or charac-

terized by an abuse of discretion or a clearly unwarranted exercise of discretion. Code 1977, § 17A.19(8)(a)-(g).

If the commission, in the face of the unequivocal statutory proscription on sex discrimination in public employment, had held against Gunther, we would have a difficult case. Then quoted subparagraph *a* in the Administrative Procedure Act -- violation of statutory provision by the commission -- would squarely confront us. But the commission held for Gunther and enforced the proscription.

I have examined subparagraphs *a* through *g* of § 17A.19(8) and cannot find any subparagraph which permits the courts to intervene here. The commission did not in its decision violate a statutory provision; rather, it carried out the command that "No person shall be . . . in any way . . . discriminated against with respect to employment . . . because of his . . . sex . . . ." 62 G.A. ch. 95, § 18 (Code 1977, § 19A.18); see Reynolds v. Wise, 375 F. Supp. 145 (N.D. Tex.). Certainly the commission did not contravene a constitutional clause; on the contrary it implemented the guarantee that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1; see Dothard v. Rawlinson, 97 S.Ct. 2720, 53 L.Ed.2d 786 n. 20 (U.S.) It did not violate residents' constitutional right of privacy, for it excepted assignments "to assure inmate privacy." The commission did not exceed its statutory authority; its very function is to carry out the provisions of the Merit System Act as it did here. Nor did the commission violate an agency rule, employ improper procedure, or apply an erroneous rule of law. The rule of law involved is the statutory proscription on sex discrimination, which the commission enforced.

As to subparagraph *f* ("unsupported by substantial evidence") and subparagraph *g* ("unreasonable, arbitrary and capricious" or "abuse of discretion"), substantial evidence shows that women can perform some of the tasks in the Reformatory, and the commission did not rule that women be

allowed to do everything -- it made an exception regarding privacy and hazards. With these exceptions the ruling is well within the evidence and neither unreasonable nor in excess of the commission's discretion. Indeed the Reformatory's own psychologist admitted on the stand, "I would say that I think it would be much more advantageous if we had a setting where we could provide adequate security to women so that we could employ more women in various areas and I think that having men interact with more women in a secure way would be of much greater benefit to rehabilitation than the current situation." Since the commission carried out the statutory anti-discrimination language here, the only way I can see for calling the commission's decision "unreasonable, arbitrary and capricious" is by holding the statute itself unreasonable, arbitrary, and capricious, yet I do not understand that the Reformatory challenges the validity of the statute.

The temptation is subtle and strong for judges to decide themselves whether females should be appointed correctional officers. But we should not enter upon the question of the wisdom of opening up employment to women in male correctional institutions, for that decision has not been confided to us. Employment in the Reformatory is public employment and the whole problem of sex discrimination in public employment has been entrusted by the legislature to the commission, functioning under the unequivocal mandate of the Merit System Act. We should not thwart the commission in its effort to execute the enjoinder of the act.

Thus I would not interfere with the legislatively designated body in its handling of the present discrimination problem. See Davis, Administrative Law Text, § 30.04 at 549-551 (3rd Ed.). I would instead uphcld the affirming judgment of the District Judge.

McCORMICK, J., joins this dissent.

REYNOLDSON, J. (dissenting)

If there is an intimation in the majority opinion a female should be denied employment in any position because of personal danger to her, I disagree.

I do agree with the majority the present employment of a female in a CO II position at Iowa Men's Reformatory would involve an invasion of the inmate's constitutional right of privacy. I also agree the duty "exemptions" granted by the commission would create still another irrational classification in a system which, at least as it relates to this department, is riddled with inconsistencies.

Confronted by these circumstances, I would reach a different disposition of this appeal. On this record it is impossible to reach a fair and rational result for either Gunther or the department. Present classifications fail to reflect not only necessary BFOQ exceptions, but the duties and responsibilities undertaken by those in the same classification in various institutions under the department. See § 218.1, The Code.

There is evidence in the record there are no male guards classified CO II at the women's reformatory. There are women employees "kept in a protected situation" but classified CO II at the state penitentiary (for men). The sex, classifications, duties and responsibilities of correctional officers at correctional release centers and camps were not the subject of testimony in this case. Similar anomalies may be present there.

The commission assigns some blame to the department for this situation, but concedes its own unfulfilled responsibility to clarify institutional job classifications. This duty is imposed on the commission by statute, § 19A.9(1), and under its own rule 570-3.1(4), I.A.C.:

> The commission through co-ordination with, and the co-operation of, the agencies shall from time to time review the classification plan and may add, combine, divide or abolish classes or revise the specifications of existing classes or establish new classes as the needs of the classified service so indicate. * * *

Any attempt to assign Gunther to a classification in these circumstances would be a temporary expediency at best.

The decisions below prejudiced the department's substantial rights and flowed from an erroneous concept of law. As a result this court is authorized to grant wide-ranging relief, including power to "reverse, modify, or grant any other appropriate relief from the agency action, equitable or legal and including declaratory relief." § 17A.19(8), The Code.

I would reverse and remand this case to the commission for ultimate decision following reclassification and opportunity for each party to present additional evidence. This decision should be rendered in light of the following considerations:

1. The decision in Dothard v. Rawlinson, _____U.S. _____, 97 S.Ct. 2720, 53 L.Ed. 2d 786 (1977).

2. The reality that in appropriate situations there must be BFOQ exceptions recognizing prisoners' limited rights of privacy.

3. The precept that all merit system employees should receive equal pay for equal work and this cannot be achieved by permitting departments or agencies unlimited freedom in classifying positions and developing pay plans. Peters v. Iowa Emp. Security Com'n, 235 N.W.2d 306, 310 (Iowa 1975); see last paragraph of § 19A.3, The Code.

4. To the extent the same are not nullified by § 17A.22 as inconsistent laws, the right of the director of the division of corrections to perform those duties prescribed in § 217.14(1), (2), (3) and (4); the right of the directors of the particular correctional institutions to recommend management rules, § 218.4; and the right of the division director to "classify the

officers and employees into grades," § 218.13.

5. The complex and difficult realities of running a penal institution, and the wide-ranging deference to be accorded the opinions and decisions of prison administrators, Jones v. North Carolina Prisoners' Union, _____U.S. _____, _____, 97 S.Ct. 2532, 2538-2539, 53 L.Ed. 2d 629, 638-640 (1977).

6. The precept that when employees of either sex are protected by selective duties under a broad classification which inevitably imposes on employees of the other sex more dangerous or onerous duties and responsibilities such practice not only violates the equal pay -- equal work concept, it is reverse sexual discrimination violating § 19A.18.

Under the disposition suggested here, if Gunther ultimately were held entitled to a higher classification, or higher pay grade within her present or a comparable classification, provision could be made for retroactive payment of her rightful salary.

APPENDIX D

CERTIFICATE OF SERVICE

I, Stephen C. Robinson, Assistant Attorney General for the State of Iowa, hereby certify that on this 4th day of April, 1980, three (3) copies of the Petition for a Writ of Certiorari were mailed, correct postage prepaid, to:

Gordon E. Allen
Iowa Civil Liberties Union
5835 Grand Avenue
Des Moines, IA 50312

I further certify that all parties required to be served have been served.

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1566

IOWA STATE MEN'S REFORMATORY AND
MICHAEL V. REAGEN, PH.D.,
Commissioner, Iowa Department of Social Services,
Petitioner,

v.

CYNTHIA GUNTHER,
Respondent.

BRIEF OF RESPONDENT, CYNTHIA GUNTHER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

Page

INTRODUCTION 2

REASONS FOR DENYING THE WRIT OF CERTIORARI:

I. THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY CONSTRUED *RES JUDICATA* AND COLLATERAL ESTOPPEL IN REACHING THE MERITS OF CYNTHIA GUNTHER'S CLAIM 2

II. THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY HELD THAT THE IOWA STATE MEN'S REFORMATORY HAD FAILED TO DEMONSTRATE A BONA FIDE OCCUPATIONAL QUALIFICATION LEGALLY SUFFICIENT TO PRECLUDE CYNTHIA GUNTHER FROM PROMOTION 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases:

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1975) 4

Dothard v. Rawlinson,
433 U.S. 321 (1977) 5

Montana v. United States,
440 U.S. 147 (1979) 3,7

Pugh v. Locke,
406 F.Supp. 318 (M.D. Ala. 1976), *modified in part*, 559 F.2d 283, *cert. granted*, _____ U.S. _____, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978)..... 7

Sinicropi v. Nassau County,
601 F.2d 60 (2d Cir. 1979)..... 4

Statutes:

42 U.S.C. §2000(e), et seq. 2,3

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Respondent, Cynthia Gunther, respectfully prays that a writ of certiorari be denied, and that this Court decline to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on January 11, 1980. Petition for rehearing was denied on February 5, 1980.

INTRODUCTION

Respondent, Cynthia Gunther, accepts the Petitioners' statement of jurisdiction, the question presented, the statute involved, and the statement of the case, in this matter.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY CONSTRUED *RES JUDICATA* AND COLLATERAL ESTOPPEL IN REACHING THE MERITS OF CYNTHIA GUNTHER'S CLAIM.

Both the District Court's consideration of the facts independently in light of Federal law (Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000(e), et seq.), or the Court of Appeals' consideration of the facts and the Federal law, upon the understanding that no State tribunal was given jurisdiction to hear the discrimination claim based on the Federal statute, provide justification for the decision by both, that *res judicata* is inapplicable. Petitioners are correct that the record utilized by the Federal Court was made before the State Commission (Merit Commission) and the State Court. But as both opinions note, Cynthia Gunther was jurisdictionally precluded from raising Title VII claims before the Merit Commission, the Iowa District Court, or the Iowa Supreme Court, and, because of that jurisdictional preclusion, none of those decision-making

bodies, including the Iowa Supreme Court decision which Petitioners now assert is *res judicata,* address the issue of Title VII, and the bona fide occupational qualification provided thereby.

The Petitioners suggest that Cynthia Gunther, if dissatisfied with the opinion of the Iowa Supreme Court, could have and should have appealed to this Court pursuant to the *Montana* decision (*Montana v. United States,* 440 U.S. 147 (1979)). A review of the Iowa Supreme Court opinion (Appendix C, Petitioners' Petition for Writ of Certiorari, p. 34), indicates that only a vague reference was made to 42 U.S.C. §2000(e), and certainly, in no conceivable statement of the legal principles involved in that case, could it be said that the decision answered either negatively or affirmatively, the applicability of 42 U.S.C. §2000(e).

Under established doctrines of *res judicata*, neither the issue of the applicability of 42 U.S.C. §2000(e), et seq., to the facts as found by the Merit Commission of Iowa, nor the opportunity to present those facts to any forum having jurisdiction thereover, was given to Cynthia Gunther. Petitioners assert on page 6 of their Petition for Writ of Certiorari, that Respondent should not be permitted to "forum shop when dissatisfied with the holding of the state Supreme Court". A careful reading of the Iowa Supreme Court opinion (Appendix C), will indicate that no appeal to the United States Supreme Court was possible, in that that decision was based exclusively on State law. The only opportunity for Cynthia Gunther to pursue Federal claims was in the Federal forum. In none of the actions subsequent to the Merit Commission decision in her favor, was she the dissatisfied party, and the appellant. The forum was chosen by the Petitioners, not Cynthia Gunther. She was jurisdictionally precluded from raising her Federal claims.

> "Moreover, the legislative history of Title VII manifests a Congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discriminations." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974), cited by the United States Court of Appeals for the Eighth Circuit in its decision (Appendix A, Petitioners' Petition for Writ of Certiorari, p. 12).

Petitioners allege opposite results in an attempt to induce certiorari. The only case finding a *res judicata* effect is *Sinicropi v. Nassau County,* 601 F.2d 60 (2d Cir. 1979), which holds such an effect should be given to prior State Court proceedings where the plaintiff chose to submit a State agency decision to review by State Courts. That is simply not the case here. Title VII, and its effect and implications for the fact situation before this Court, were never presented to a State agency. Neither State merit law, nor State civil rights law, was reviewed by the Iowa Court. *Sinicropi* is therefore inapplicable. Elimination of *Sinicropi* makes consistent all Federal determinations that Title VII claims may be litigated, and that *res judicata* and collateral estoppel have no effect. (Petitioners' Petition for Writ of Certiorari, p. 14, and cases cited therein.) Either, under controlling precedent, *res judicata* and collateral estoppel are inapplicable to Title VII proceedings, or, if applicable under general principles of *res judicata*, Cynthia Gunther has not had the opportunity, nor has she presented her Title VII claims to a forum having jurisdiction thereof, and therefore, *res judicata* is inapplicable to the decision of the Iowa Supreme Court. Petitioners urge *Montana v. United States, supra,* but that case also provides support for Cynthia Gunther's position, in that the Court, in *Montana,* stated that the application of collateral estoppel depended on three factors: (1) whether the issues presented in the Federal litigation are in substance the same as those resolved in the State Court (which they were not); (2) whether controlling facts or legal principles have changed significantly since the State Court judgment (which they have, for Title VII was never litigated); and (3) whether other special circumstances warrant an exception to the normal rules of preclusion (which was the view of the Court of Appeals; Appendix A, p. 16, n.7).

II.

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY HELD THAT THE IOWA STATE MEN'S REFORMATORY HAD FAILED TO DEMONSTRATE A BONA FIDE OCCUPATIONAL QUALIFICATION LEGALLY SUFFICIENT TO PRECLUDE CYNTHIA GUNTHER FROM PROMOTION.

Contrary to the assertion of the Petitioners, this case does not involve issues of national interest, either as to bona fide occupational qualification under Title VII, or as an unwarranted extension of *Dothard v. Rawlinson,* 433 U.S. 321 (1977). Petitioners have once again misconstrued the results reached by the Iowa District Court, the United States District Court, and the Court of Appeals for the Eighth Circuit, ignored their suggestions for remedy to both

horns of the dilemma, but instead, have elected to pursue this appeal. It must be remembered that Cynthia Gunther's complaint under Title VII, affirmed by both the District Court and the Court of Appeals, is not that certain job functions, because of prison security and inmate privacy, are subject to bona fide occupational qualifications. Her complaint is specifically that the promotional ladder has been foreclosed to her.

> "By upholding plaintiff's claim in the present action, we are not holding that Anamosa could not possibly create a bfoq exception relating to some job functions for correctional officers at the men's reformatory. A proper classification narrowly drawn . . . may satisfy a bfoq . . . We need not decide that question. What we do hold is that Anamosa's current classification system violates Title VII because it impermissibly attempts to establish a bfoq which has the effect of prohibiting any advancement in a person's chosen field beyond a CO I level because that person is a woman." *Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079 (8th Cir. 1980); Appendix A, Petitioners' Petition for Writ of Certiorari, p. 21.

This Court need not grant this petition for certiorari in order to provide a remedy to these Petitioners. That remedy has already been suggested, thrice over.

> "We do not have the IMEC (Iowa Merit Employment Commission, State of Iowa) as a party to this litigation, and Justice Reynoldson's (Chief Justice, Iowa Supreme Court) is not an option available to us. As a practical matter, however, it would appear possible to resolve this controversy by reclassifying the job descriptions giving consideration to the factors enumerated in Justice Reynoldson's dissent." *Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079 (8th Cir. 1980); Appendix A, Petitioners' Petition for Writ of Certiorari, p. 22, n.9.

Gunther is not an over-extension of *Dothard.* Both the District Court and the Court of Appeals distinguished *Dothard* on the basis of a factual distinction. The prison system described in *Pugh v. Locke,* 406 F.Supp. 318, 323-325 (M.D. Ala. 1976), *modified in part,* 559 F.2d 283, *cert. granted,* _____ U.S. _____, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978), is not found in Anamosa, Iowa. However, "(A)lthough *Dothard, supra,* is distinguishable on the basis of difference between prison conditions and inmate populations in Alabama and Anamosa, it provides an analytical framework for assessing the profferred bfoq in this case". *Gunther v. Iowa State Men's Reformatory,* District Court opinion, McManus, Edward; Appendix B, Petitioners' Petition for Writ of Certiorari, p. 26.

Both the District Court and the Court of Appeals utilized *Dothard,* without an extension of same, but in applying the balancing test prescribed by *Dothard* to the factual situation at Anamosa, and the classification system offered by the Petitioners, which classification system they have consistently refused to modify, and found Petitioners' arguments wanting.

> "In addition to showing that the hiring of women at Anamosa would undermine the essence of the prison administration, Anamosa must also demonstrate it could not reasonably rearrange job responsibilities in a way to minimize the clash between privacy interests of the inmates and the non-discrimination principle of Title VII." *Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079 (8th Cir. 1980); Appendix A, Petitioners' Petition for Writ of Certiorari, p. 20.

There are women who have been promoted to Correctional Officer II at the Iowa maximum security men's penitentiary at Fort Madison, who perform limited duties. The same job description applies. The same officials who operate Fort Madison, operate Anamosa, but stubbornly refuse to admit that the classification is subject to Title VII.

CONCLUSION

For all of the foregoing reasons, Cynthia Gunther respectfully requests that a writ of certiorari be denied, and that the judgment and decision of the United States Court of Appeals for the Eighth Circuit in this case be allowed to stand.

Respectfully submitted,

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